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NO. 82-2157

In the

Supreme Court of the United States

October Term, 1984

CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS PENSION FUND and CENTRAL STATES, SOUTHEAST AND SOUTHWEST AREAS HEALTH AND WELFARE FUND,
Petitioners,

v.

CENTRAL TRANSPORT, INC., et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

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RESPONDENT'S SUPPLEMENTAL BRIEF ON THE MERITS

NOW COME Respondents, Central Transport, Inc., et al. pursuant to Rule 35.5 of the Rules of the Supreme Court of the United States and file this Supplemental Brief in support of their Brief on the Merits.

I. A UNANIMOUS PANEL OF THE SIXTH CIRCUIT COURT OF APPEALS CONSIDERED THE ISSUES OF THIS CASE AND REAFFIRMED ITS REASONING.

Judges Keith, Krupansky and Phillips recently considered a case with facts similar to those in *Central Transport* and adopted the holding in *Central Transport* as dispositive of the issue. *Central States Southeast and Southwest Areas Pension Fund* v. *R-W Service System, Inc.*,. No. 82-1899 (6th Cir., filed Aug. 23, 1984). (App. M.B. "G").

In addition to *Central Transport's* facts, the court was faced with the practical difficulty of demanding records that the employer had destroyed in its normal course of business. Since ERISA's fiduciary duty section became effective in 1975 and Taft-Hartley trustees have not been given audit power over non-covered employees, it is reasonable for a contributing employer to have destroyed the records the Funds now seek. To imply a power in the Funds not anticipated by the employer (or indeed asserted by the Funds at the time the records were compiled) may result in the anomaly that the Funds are entitled to audit records legitimately destroyed by the unsuspecting employer.

II. CONTRARY TO THE POSITION OF THE FUNDS THAT THEY WILL BE LIABLE TO UNDISCOVERED PARTICIPANTS WHO LATER APPLY FOR BENEFITS, THE HEALTH AND WELFARE TRUSTEES DISCLAIMED LIABILITY TO THEIR OWN PARTICIPANTS.

In a notice effective September 1, 1984, the Trustees of the Health and Welfare Plan advised participants that if their employer fails to make a contribution for their account, they will receive no benefit. (App.M.B. "H"). This is antithetical to Central States' position that a qualified employee is entitled to plan benefits even if the Funds fail to collect a contribution for his account. The Funds cannot complain to this Court that they may be liable to a participant despite a lack of contributions to his account and in the same breath advise the participants that failure of contribution results in a cut-off of benefits.

CONCLUSION

R-W Service adds another panel of judges to the unanimous opinion issued in *Central Transport* and exposes the practical problems of record retention that Congress can best address. The notice of the Health and Welfare Plan Trustees demonstrates clearly that the Trustees do not believe they are liable for benefits if an employer fails to make contributions.

Respectfully submitted,

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